IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA

v.

1-ETHAN NORDEAN
2-JOSEPH R. BIGGS
3-ZACHARY REHL
5-ENRIQUE TARRIO
6-DOMINIC J. PEZZOLA,
Defendants.

CR Nos. 1:21-cr-00175-TJK-1
1:21-cr-00175-TJK-2
1:21-cr-00175-TJK-3
1:21-cr-00175-TJK-5
1:21-cr-00175-TJK-6

Washington, D.C.
Thursday, April 20, 2023
9:15 a.m.

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TRANSCRIPT OF JURY TRIAL - DAY 68
*** MORNING SESSION ***
HELD BEFORE THE HONORABLE TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE

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Ms. Hernandez ticked -- sent around on email was just the issue of Fischer and the impact of Fischer on the jury instructions. So I'm going to lay out an oral ruling on that right now, and then there's another matter that, I think, we do need to take up before the -- we begin with the jury, and then I think most of the other things we can pick up on the other side of where we are on all of that.

So as far as Fischer goes, before me are two motions relating to the D.C. Circuit's recent -- and fractured -- decision in United States v. Fischer which is 2023 WL 2817988. It's a D.C. Circuit opinion from April 7th, 2023.

MS. HERNANDEZ: It seems like yesterday, Your Honor, that it was --

THE COURT: In that case, the Circuit reversed the District Court's dismissal of 18 United States Code 1512(c)(2) counts in three January 6th cases. The District Court had concluded that the statute's actus reus, quote, "requires that the defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede, or influence an official proceeding." That was United States v. Miller, 589 F. Supp. 3d 60 at 78, a D.D.C. case from 2022, Judge Nichols.

A majority of the panel, Judges Pan and Walker, disagreed with the District Court and reversed its judgment.

But those two judges parted ways on what to do with the element of 1512(c)(2) requiring that a defendant acted corruptly. Judge Pan concluded that a -- that ruling on a precise definition for "corruptly" was unnecessary and unwise, because the District Court did not reach the issue because it wasn't, in her view, thoroughly briefed and the court could otherwise find that the indictment adequately stated an offense. Judge Walker, on the other hand, resolved that a defendant's act is only corrupt under Section 1512(c)(2) if the defendant takes the action -- takes an action, quote, "with an intent to procure an unlawful benefit either for himself or some other person." This reading, he contended, quote, "resolves otherwise compelling structural arguments for affirming the District Court as well as the defendant's vagueness concerns," closed quote. Judge Katsas, on the other hand, dissented from the majority outright, instead endorsing an, quote, "evidence-focused interpretation," closed quote, of 1512(c)(2)'s actus reus that -- it was a more evidence-focused interpretation, although it wasn't precisely -- it was slight- -- it was more broad than what the District Court had endorsed.

Defendant Nordean, joined by Defendant Tarrio, asks me to instruct the jury on the definition of "corruptly" in 18 United States Code Section 1512(c)(2) in

the way endorsed by Judge Walker in his concurring opinion, or else dismiss both 1512 counts in the indictment. And Defendant Rehl, joined by Defendants Biggs and Tarrio, separately move to dismiss Counts 2 and 3.

To start, Nordean argues that Judge Walker's opinion is binding on me under Marks v. United States, 430 United States Code -- U.S. 188, a Supreme Court case from 1997, a position does -- Judge Walker also says, quote, "may" be correct. The Marks rule provides that, quote, "when the Supreme Court issues fragmented opinions, the opinion of the Justices concurring in the judgment on the narrowest grounds should be regarded as the Court's holding," closed quote. That's King v. Palmer, 950 F.2d 771 at 780, a D.C. Circuit case from 1991 that is quoting Marks at 193. So Nordean argues I must instruct the jury in this case using Judge Walker's definition of "corruptly." And so I've already indicated as we discussed the jury instructions in the case, I disagree with that.

To start, authority for applying the Marks rule to Circuit opinions, as opposed to Supreme Court opinions, is scarce. It does not appear the D.C. Circuit has ever done so, and Judge Walker himself questioned whether a future panel would apply it here. Instead [sic], he, quote, "expressed no opinion about whether it should," closed quote, noting that the rule, quote, "has generated

considerable confusion."

But even assuming the Marks rule should apply here, I'm not convinced that Judge Walker's concurrence is, quote, "the opinion," quote, "concurring in the judgment on the narrowest grounds," closed quote. As the Circuit has explained, quote, "one opinion can be meaningfully regarded as narrower than another," closed quote, open quote, "only when one opinion is a logical subset of other, broader opinions." That's the King case I mentioned before at 781. Put another way, quote, "The narrowest opinion must represent a common denominator of the court's reasoning," closed quote; meaning, it, open quote, "must embody a position implicitly approved by at least a majority of the judges who support the judgment," closed quote.

The posture of this case is critical to applying the D.C. Circuit's "logical subset" test for Marks. Here, the Fischer court reviewed only a motion to dismiss under Rule 12 for failure to state an offense. So to hold, as the court did, that the defendants' indictments stated an offense under Section 1512(c)(2), it needed to conclude only that the statute applied to defendants' alleged conduct and that the indictments state essential facts constituting the offense charged. That's from Judge Pan's lead opinion, citing Hamling v. United States, 418 U.S. 87 at 117, a Supreme Court case from 1975, and Federal Rule of Criminal

Procedure 7(c)(1).

Judge Pan did just that in her lead opinion. After concluding that the District Court erred in constraining the actus reus of 1512(c)(2) to obstructive acts taken, quote, "with respect to a document, record, or other object," closed quote, she examined several prevailing definitions of "corruptly." She included [sic] that under each of the formulations, "corrupt intent exists at least when an obstructive action is independently lawful [sic]," closed quote. She also noted that even if Section 1512(c)(2) requires an [sic], quote, "additional element," closed quote, that a defendant intends to confer an unlawful benefit on himself or a third party, the defendants' "alleged intentions of helping their preferred candidate" -- in that case -- "overturn the election results would suffice," closed quote. So she said, the sufficiency of the indictments in this case does not turn on the precise definition of "corruptly."

So for that reason, Judge Pan's ruling on "corruptly" was decidedly narrow: an indictment adequately alleges that a defendant's obstructive conduct was corrupt at least when it states that a defendant committed unlawful acts with the intent to confer a benefit on another person. Beyond that, the opinion takes no position on the reach of "corruptly," ultimately, including on whether either or both

of those conditions is necessary or sufficient.

Judge Walker's opinion sweeps much broader, conclusively deciding that to act corruptly is, quote, "to act with an intent to procure an unlawful benefit either for himself or for some other person," closed quote, apparently with [sic] regard to whether the defendant used independently lawful or unlawful means. That's his concurrence at Page 17. His opinion, thus, reaches beyond the defendants charged in Fischer, its companion cases, and those similarly situated to any defendant charged with 1512(c)(2) in any context.

Now, as the D.C. Circuit applies the Marks rule at least to Supreme Court opinions, Judge Pan's decision is the logical subset of Judge Walker's, not the other way around, in my view. For a ruling to prevail under Marks, it most -- it "must embody a position implicitly improved [sic] by the majority of judges who support the judgment." That's King, again, at 781. The only gloss on the meaning of "corruptly" on which Judge Pan -- Judges Pan and Walker agree and is necessary to support the judgment is that the Fischer defendants' actions, as alleged in that indictment, would be corrupt. But beyond that, Judge Pan's silence on what else may or may not be enough to satisfy Section 1512(c)(2)'s requirement that a defendant act corruptly is not, quote, "implicit approval," closed quote, of Judge Walker's views

on the matter.

Judge Walker's contrary view, and Mr. Nordean's reliance on the same, doesn't persuade me otherwise. Judge Walker says, for -- I mean, I'm sorry, Mr. Nordean says, for example, that he reads (c)(2) to cover only some of the conceivable defendants the lead opinion might allow a court to convict. But the lead opinion -- at least with respect to the "corruptly" element -- does not allow a court to convict any defendant beyond those charged in the Fischer cases or those charged with sufficiently analogous conduct. Rather, it takes no position on what a court might do in circumstances beyond those charged. Consider further Judge Walker's observation that, quote, "if a defendant is guilty under his approach, he will be guilty under the lead opinion's, but some of the defendants guilty under the lead opinion's approach will not be guilty under his approach." As I read it, the lead opinion does not really articulate an approach and it takes no position on the viability of 1512(c)(2) charges against defendants beyond those charged in that case. Judge Walker's opinion, though, does.

So to summarize, I agree with Judge Walker and Nordean that Judge Pan's lead opinion must take some position on the meaning of the word "corruptly" because, under the circumstances, I agree that without taking a position, the lead opinion would not conclude, as it does,

that the indictments should be upheld. But I part ways with what that position is. In this Circuit, and consistent with Judge Pan's lead opinion, a defendant acts corruptly at least where he commits an unlawful act with the intent to unlawfully benefit himself or another person. But whether either or both of those conditions are necessary remains an open question in this Circuit. Therefore, I'll deny Mr. Nordean's motion to the extent it argues I'm bound to instruct the jury on 1512(c)(2)'s "corruptly" element consistent with Judge Walker's concurrence.

So I'll now turn to Mr. Rehl's motion to dismiss and Mr. Nordean's alternative argument for dismissal, both of which I will also deny. Nordean and Rehl would have me find that Judge Katsas's dissent controls. They argue that Judge Walker set a condition precedent to his concurrence whereby he would only join Judge -- lead -- Judge Pan's lead opinion if she agreed with his definition of "corruptly." But Judge Pan did not agree with that definition, and so defendants contend that Judge Walker, in fact, dissented, creating a new majority and requiring me to dismiss Counts 2 and 3 in this case.

But judicial opinions are not contracts, and judgments are not open to interpretation depending on how a lower court -- at least judgments -- judgments and who joined the judgment and who did not, that question is not